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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. [redacted] 28

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT

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UNITED STATES

OCTOBER TERM, 1933

No. 994

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent herein contends that the Motor Vehicle Fuel Act of the State of California (Stats. of 1923, page 571, as amended; petitioner's brief, page 30) is a *valid law* of said State and that in view of the provisions of section 65 of the Judicial Code, U. S. C. A. Title 28, section 124, a district court of the United States is without power to order a receiver, appointed by the court to operate the business of a domestic corporation as a distributor of motor vehicle fuel, to disregard said law or to

operate said business contrary thereto or in violation thereof.

Said section 65 of the Judicial Code reads as follows:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

The validity of the said Motor Vehicle Fuel Act, so far as it has been assailed, was upheld in the case of

> *People* vs. *Sterling Refining Co.*, 86 Cal. App. 558,

and in the follawing cases:

> *People* vs. *Ventura Refining Co.*, 204 Cal. 286;
> *People* vs. *General Petroleum Corp.*, 204 Cal. 297;
> *People* vs. *Richfield Oil Co.*, 204 Cal. 301.

In the pending case no ruling has been made that the act is unconstitutional, so we think we are entitled to state to this court that said act is a valid

law of the State of California, unless otherwise determined by this court.

RESPONDENT'S ANSWER TO PETITIONER'S CONTENTIONS

I

Petitioner's first contention is thus stated:

> "The judicial power of the United States, including the power of the United States District court in California to appoint this receiver and require him to operate the properties of Western Oil and Refining Company for conservation of assets, is wholly independent of State action; and the State of California can not exert any authority in any form which directly or indirectly destroys, abridges, limits or renders inefficacious such power and jurisdiction of the United States District Court."

Counsel for the petitioner herein seems to confuse the *jurisdiction* of a Federal court with the *power* of the court in respect to matters over which it has jurisdiction.

It has at all stages of this case been conceded by respondent that the District Court has jurisdiction over its receiver and we have never claimed that a State law could limit that jurisdiction since it is conferred pursuant to the Federal Constitution and the laws enacted by Congress. What we do contend is that in exercising its jurisdiction the court is limited in respect to its *power* to do certain

things, and one of the limitations upon such power results from the requirement contained in section 65 of the Judicial Code that the receiver *must obey all valid State laws.* In view of that positive and emphatic provision, it necessarily follows that the District Court has no *power* to direct the receiver to disobey a valid State law or to operate a business without compliance with such laws, for that would be the same thing as directing the receiver to violate the laws of Congress as well as the laws of the State.

Counsel for petitioner seem obsessed with the idea that because it is difficult or may even be impossible for a receiver to operate a business in compliance with State laws, he must be permitted to operate the business any way, disregarding and disobeying such laws, merely because he is a receiver appointed by a Federal court. Section 65 makes it perfectly clear that in respect to the operation of a business by a receiver he is on the same footing as anyone else in so far as the observance of State laws is concerned.

And counsel for the petitioner seem further to confuse jurisdiction with power when they argue that if compliance with a State law is impossible the result is that the State law impairs the *jurisdiction* of the District Court over its receiver. No impairment of jurisdiction results therefrom, and the limitation upon the *power* of the court results not from the State law but from the laws of Congress which have conferred upon the court its

jurisdiction and in the exercise of that jurisdiction by the court have placed certain limitations thereon.

Whether we call the requirement that the receiver must obey all valid State laws a limitation upon the jurisdiction of the court or upon its power is immaterial as in any event the limitation results from an act of Congress which has control over both the jurisdiction and power of the court.

In the case at bar the error of the District Court was in failing to consider section 65 in its proper light. That court construed the section as if it directed the receiver to obey only such laws of the State as he could conveniently obey.

The Circuit Court of Appeals, however, gave the section its full force and effect. That court said:

> "The statute (section 65) is plain and emphatic, and we can not read into it any exception which would permit a receiver to ignore or refuse to comply with its mandate * * *. But compliance by a receiver with the State statute is a condition precedent to his right to engage in the business referred to; and if the receiver can not comply therewith we think the estate should be liquidated and the receivership closed." (Tr. of Rec. p. 54.)

JURISDICTION AND POWER OF FEDERAL COURTS

The Circuit Court of Appeals did not find it necessary to cite any authorities in support of its ruling that the receiver must obey valid State laws and that the court is without jurisdiction or power to direct

him to do otherwise. In view of the insistence by counsel for petitioner herein that the District Court had both the jurisdiction and the power to authorize and direct its receiver to operate the business of the corporation and to disregard the State law, cases may be cited which we think will demonstrate that counsel for the receiver are in error in their contention.

Section 1 of Article III of the Federal Constitution provides in part that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

By reason of this provision it has been held that every court of the United States must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States.

> *Jecker* vs. *Montgomery,* 13 How. 515, 14 L. Ed. 240.

While the primary source of jurisdiction of Federal courts is found in the Constitution, jurisdiction is directly conferred through the medium of Congress by grants thereof, and is conferred with such limitations and exceptions as Congress shall prescribe when creating the courts and defining their authority.

> *Bankers Trust Co.* vs. *Texas etc. R. Co.,* 241 U. S. 295, 60 L. Ed. 1010.

As to inferior Federal courts the Constitution is

not self-executing or automatically operative, and legislation by Congress was necessary to prescribe the extent of power and the means of its exercise.

In re Higdon, 269 Fed. 150.

Federal courts have no power to increase or diminish their jurisdiction, though they may regulate its exercise in any manner *not inconsistent with the laws of the United States.*

Venner vs. *Great Nor. R. Co.,* 209 U. S. 24, 52 L. Ed. 666;

Turner vs. *Bank of North America,* 4 Dall. 10, 1 L. Ed. 721.

The equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States, and their powers and rules of decision are the same in all the States.

Noonan vs. *Lee,* 2 Black 509, 17 L. Ed. 278.

Section 41 of the Judicial Code (U. S. C. A. Title 28, page 32) defines the original jurisdiction of district courts of the United States.

While a State law may not give jurisdiction to any Federal court, it may give a substantial right which may be enforced in the proper Federal tribunal. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy.

Ex parte McNeil, 13 Wall. 236, 20 L. Ed. 624.

"Speaking generally and with certain exceptions not controlling here, the Federal courts, when their jurisdiction is properly invoked, enforce State laws precisely as do the State courts under similar circumstances. For the time being and for the particular case in hand, they function as if sitting in the place of the local court. This is the true theory of the Constitution and of the Federal laws. The aim of the government is to provide impartial tribunals to which certain classes of litigants may with confidence resort, and where they may have a complete remedy. They are not to lose any rights by going into a Federal court. If they have rights, whether founded on State laws or otherwise, those rights are to be protected and enforced in the court of their choice. *Clark* vs. *Smith* (Ky. 1839) 13 Pet. 194, 203, 10 L. Ed. 123;"

In view of the foregoing it seems very strange to say that a party may go into a Federal court to enforce rights founded on valid State laws, and yet in the same proceeding, wherein the validity of the State law is not challenged, to say that the court may set aside the State law and declare that it shall not be observed.

Such, in our opinion, was the effect of the order of the District Court.

The receiver is operating under appointment by the court and as to him the court may enforce all valid State laws. But when the receiver brings the State of California and its officials into court and

the State asks that the State laws be enforced, the court, instead of enforcing the State law, authorizes and directs the receiver to ignore it and to operate in violation thereof, although the court is not called upon to decide any question as to the validity of the law, and does not, in fact, pass upon that question.

In the case of *In re Swan,* 150 U. S. 637, this court quoted the following from the opinion of the Circuit Court in the same case:

> "As a common carrier, the receiver is bound to respect *and obey the laws of the State.* He and the court from whom he holds his appointment are servants of the law, exceptionally bound to pay it the utmost deference and respect." (Italics ours.)

This court apparently approved this language for its own opinion dealt with the provisions of the State law and with the question whether that law authorized the action taken by a local officer in seizing property in the possession of the receiver.

No intimation was given in the opinion to the effect that the receiver could ignore State laws or that the court could authorize him to do so. To the contrary, the fact that the court quoted with apparent approval the language of the Circuit Court, hereinabove set forth, that the receiver is bound to respect and obey the laws of the State, and the further fact that the court decided the case on the basis of its construction of the meaning and operation of the State law, lead irresistibly

to the conclusion that this court was also of the opinion that the receiver was bound to respect and obey the State law, and that the trial court had no power to direct or to authorize the receiver to do otherwise. That conclusion seems inherent in the decision.

In answer to our contention in the District Court that section 65 of the Judicial Code hereinabove quoted requires the receiver to obey valid State laws, counsel for the receiver said in their brief:

> "The provisions of the Federal Judicial Code (U. S. C. A. Tit. 28, Sec. 124, Judicial Code Sec. 65) requiring, in a general way, that Federal equity receivers shall operate according to the VALID laws of the States have no application whatsoever to the problem now before this court in the case at bar. There can be no *valid* provisions of a State statute limiting the jurisdiction of a Federal court or requiring its receiver to get a license from the State before he may operate, as the cases already cited abundantly show. In none of them did any judge concede any force to any argument that this section of the Federal Judicial Code permits any State in any way to interfere with, or limit the jurisdiction of, the Federal courts."

In support of that statement counsel cited *Ex parte Tyler,* 149 U. S. 164, 37 L. Ed. 689, mainly relied upon, and certain other cases which in our opinion are not at all in point.

We call the court's especial attention to counsel's comment on the provisions of section 65 of the Judi-

cial Code to the effect that these provisions require "in a general way" that receivers shall operate according to the valid laws of the States.

What is counsel's meaning here by this attempted qualification of the provisions of section 65? There is certainly no qualification in the section unless it be in the use of the word "valid," and as stated before the question of the validity of the law is not here before the court, and has not been raised in this case and therefore its validity must be assumed.

Of course we do not claim that a State statute limiting the *jurisdiction* of a Federal court would be of any validity. We are not here concerned with any such statute, and therefore the cases cited by counsel for the receiver in this connection are clearly not in point. The District Court had and still has jurisdiction of the receivership proceedings and we have never questioned and do not now question that fact.

But to have jurisdiction of a case is one thing, while to have power to set aside valid State laws is quite a different thing. Section 65 of the Judicial Code states positively and emphatically, not in "general" terms but in direct and specific terms, that a receiver *must obey all valid State laws.*

More definite language to convey the intent of Congress could not have been employed.

As interpreted by the District Court, however, section 65 apparently means "such laws as the court thinks should be obeyed."

That such a qualification of the express language of the section can not be read into it needs no argument. To give the section such a construction would amount to judicial legislation and that is prohibited. Nor is there any room for construction for where the language is clear and plain there is no necessity for construction and it may not be resorted to.

The case of *Ex parte Tyler,* 149 U. S. 164, so strongly relied upon by counsel for the receiver, affords no support whatever to the contention that the receiver may operate in violation of State laws. What the court said was:

> "Neither that nor the second section (65 of the Judicial Code), which provides that the receiver shall manage the property 'according to the valid laws of the State in which such property shall be situated' restricts the power of the circuit courts to *preserve property* in the custody of the law *from external attack.*" (Italics ours.)

In that case the question involved was whether property in the possession of a Federal equity receiver was subject to seizure under process issuing from a State court. No such question is involved in this case as no attempt has been made to seize any property in the possession of the receiver, or in any manner whatever to interfere with such possession. Furthermore, the question of contempt of court which was involved in the *Tyler* case is not present here.

Nor is there any question in this case of the unconstitutionality of a State statute, or of the

legality of a tax, both of which matters were involved in the *Tyler* case.

Actually the facts of the *Tyler* case are so different from the facts here that the decision in the *Tyler* case has no bearing upon this case.

But aside from that, there are expressions in the *Tyler* decision which clearly show that the court recognized the law stated in section 65 of the Judicial Code. We have already quoted one expression of the court relative to section 65 wherein the court said that such section did not restrict the power of the court to *preserve property in the custody of the law from external attack.* We readily concede this to be true but it does not touch the case here for reasons which have already been stated.

At page 183 of the opinion in the *Tyler* case it was said:

> "The levy of a tax warrant, like the levy of an ordinary *fieri facias,* sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

Why did the court say that the *lien for taxes must*

be recognized and enforced? Because the court was applying section 65 which requires that all valid State laws be obeyed. A law imposing a lien for taxes is of no greater validity than a law requiring the giving of a bond for the payment of taxes. If one must be recognized and enforced so must the other. The court can not select certain State laws and say that such laws will be recognized and enforced while other equally valid laws will be set aside and ignored. No such discretion is vested in the court and could not be without violating the Constitution of the United States in respect to the sovereignty of the States.

In the District Court counsel for the receiver argued that the position taken by the State of California would result in a "humiliating deprivation of jurisdiction of the Federal court which would affect the interests of the United States, to say nothing of others."

If that be true, then Congress is to blame for enacting section 65 of the Judicial Code.

But counsel for the receiver were wrong in their premise and wrong in their conclusions.

We have already conceded and at this point again concede that the District Court had jurisdiction in the receivership proceedings and in all matters growing out of such proceedings. And we again assert that we have never at any time objected to such jurisdiction or attempted in any way to interfere with it, being fully cognizant of the fact that

the court first acquiring jurisdiction retains such jurisdiction and may not be divested thereof.

But jurisdiction to *conserve* the *property* and to *protect* the same against external attack is not and never has been an issue in this case. The property is *in custodia legis* and the State is not trying to interfere with that custody or with the court's management of the property, nor is the State attempting to dictate to the court how it shall proceed in the matter.

To restate our position it is simply this:

That in carrying on the business of Western Oil & Refining Company the receiver thereof *must obey valid State laws,* and that any order of the District Court which authorizes and directs the receiver to operate such business in violation of valid State laws is void.

This is the question stated in the beginning of this brief and it is the question which we argued in the District Court and to which we directed our argument in the Circuit Court of Appeals.

We think we have demonstrated that the receiver must obey valid State laws by citing section 65 of the Judicial Code; that the law here in question is a valid State law but that its validity is not in issue here; and, finally, that the order of the court, in so far as it directs and authorizes the receiver to operate the business of Western Oil & Refining Company in violation of any valid State law is inoperative and void.

Our conclusion in this respect is, in our opinion, amply sustained by numerous cases and to those cases we will now refer.

Central Trust Co. of N. Y. vs. *St. Louis, A. & T. Ry. Co.*, 40 Fed. 426:

In this case the court was considering sections 2 and 3 of the act of Congress now incorporated in section 65 of the Judicial Code, particularly section 3 providing that a receiver may be sued in any court without the previous leave of the court which appointed him.

In that connection the court said:

> "These sections were reenacted in act of August 13, 1888 (25 U. S. St. 436). This act was intended to correct abuses that had grown up under the old practice, some of which were pointed out before the passage of the act, in the opinion of this court in *Dow* vs. *Railroad Co.*, 20 Fed. Rep. 267. The act abrogates the old rule on the subject of suing receivers. It is no longer unlawful to sue a receiver appointed by a United States court without leave of the court appointing the receiver. The court now has no discretion to say when its receiver may be sued. The act gives the right, without condition or qualification. It is a right not to be nullified, evaded, or abridged. No conditions can be imposed on its exercise. The court must give effect to the act. It has no discretion to do anything else."

What the court here said as to the right to sue a receiver is equally applicable to the conduct of

a receiver in respect to obeying State laws. As the court said, there are no conditions or qualifications to the statute, and no conditions can be imposed on its exercise—*the court must give effect to the act.*

Hornsby vs. *Eddy,* 56 Fed. 461:

In this case it was held that when a receiver is appointed to operate a railroad, he operates it as if he were the railway corporation itself, and State laws which apply to the company apply likewise to him. In this case the court held that a law of the State of Kansas must be enforced.

Pierce vs. *Van Dusen,* 78 Fed. 693:

In this case the court enforced a law of the State of Ohio and made the same applicable against a receiver of a railroad corporation acting under orders of a Federal court.

In answer to the contention that the law did not apply to receivers operating under orders of a court of chancery, the court said:

> "The appointment of a receiver of a railroad does not change the title to the property nor work a dissolution of the corporation. Although the creature of the court, and acting under its orders, the receiver, for most purposes, stands in the place of the corporation, exercising its general powers, asserting its rights, controlling its property, carrying out the objects for which it was created, discharging the public duties resting upon it, and representing the interests as well of those who own the railroad as of those

who have claims against the corporation or its property. The corporation remains in existence notwithstanding a provisional receivership established by an order of court; and for the purpose of effectuating the will of the State, as manifested by the act of 1890, an action against the receiver arising out of his management of the property may be regarded as one against the corporation 'in the hands of' or 'in the possession of' the receiver. *McNulta* vs. *Lochridge*, 141 U. S. 327, 331, 12 Sup. Ct. 11."

Again the court said (p. 698):

"It is the duty of the Federal court sitting in this State to enforce all enactments having such objects in view, unless they encroach upon the powers and authority of the United States. That duty arises out of the statute declaring that 'the laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' Rev. St. Sec. 721; *Baltimore & O. R. Co.* vs. *Camp*, 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952. Indeed, if congress had not so declared, this court, upon principles of comity, and in support of the public policy of the State, might well recognize and enforce, in actions brought against receivers of railroads, any rule established by the State for like actions brought against railroad companies."

And at page 701 the court said:

"It would seem to be clear that, under this act of Congress, if a railroad in the possession

of a Federal receiver is to be managed and operated according to the requirements of the laws of the State in which the property is situated, 'in the same manner that the owner or possessor thereof would be bound to do if in possession thereof,' such management and operation must be subject to any rule prescribed by the State imposing upon railroad corporations liability for the negligence of employees having superior authority over other employees."

United States vs. *Ramsey,* 197 Fed. 144:

In this case a Federal court enforced against a receiver of a railroad company appointed by a Federal court a statute of the United States relative to hours of labor, holding that a receiver of a railway company, in the operation of the same, is a common carrier.

Fidelity Title & Trust Co. vs. *Kansas Natural Gas Co.,* 219 Fed. 614:

In this case the court said:

"The State, because of the public interest, has the power to prescribe reasonable rates for gas sold and to secure the efficiency of the service by reasonable regulations, and it is not to be doubted that a receiver of the property of the corporation *must operate it in accordance with valid State laws* in respect thereto." (Italics ours.)

Westinghouse Electric & Mfg. Co. vs. *Binghamton Ry. Co.,* 255 Fed. 378:

In this case the court said, relative to an applica-

tion by the receiver for permission of the court to apply to a State Commission for authority to increase rates:

> "The necessity for the invocation of such power, if it exists in this case, is beyond all question. This court is without power in any case or under any circumstances to increase rates of fare, or direct its receiver so to do, even while in possession of and operating the road for the benefit of the public who use it. The court can not do this, even when to run at the present established rates entails large losses to creditors and stockholders. The statutes of the United States provide that:
>
> > 'Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.'

It is the duty of a receiver appointed by the Federal court to operate the railroad according to the valid laws of the State in which such road is situated. *Erb* vs. *Morasch,* 177 U. S. 584, 585, 20 Sup. Ct. 819, 44 L. Ed. 897; *United States* vs. *Harris,* 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed.

780; Act Aug. 13, 1888, c. 886, Par. 3, 25 Stat. 433, 436, 1 U. S. Comp. St., p. 1184, Par. 1047; Judicial Code, Par. 65. In *Erb* vs. *Morasch, supra,* it is said:

> 'Now, in respect to the Federal questions, we remark, first, that it is the duty of a receiver, appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the State in which it is situated. Act Aug. 13, 1888, c. 866, Par. 2, 25 Stat. 433, 436; *United States* vs. *Harris, ante,* 305 (20 Sup. Ct. 609, 44 L. Ed. 780).' "

Mercantile Trust Company vs. *Tennessee Cent. R. Co.,* 286 Fed. 425:

We wish to quote therefrom the following:

"And, independently of the broad and unrestricted language of the statute, it is a general rule that State statutes regulating the operation of railroads, which by their terms apply only to operations by the railroad companies themselves, nevertheless extend to the operation of the railroads by receivers, where such application is not expressly excluded by the statute itself. *Pierce* vs. *Van Dusen* (6th Circ.) 78 Fed. 693, 696, 24 C. C. A. 280; *Hornsby* vs. *Eddy* (8th Circ.) 56 Fed. 461, 5 C. C. A. 560; *Central Trust Co.* vs. *Wabash Railway* (*C. C.*) 26 Fed. 12 (Brewer, J.); *International Railway* vs. *Bender,* 87 Tex. 99, 101, 26 S. W. 1047. Furthermore, section 65 of the Judicial Code (Comp. St. Par. 1047) specifically provides that any receiver in possession of property in any cause pending in any Federal court—

'shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.'

'I am hence of opinion that the same priority exists under the Acts of 1877 in favor of judgments and claims for injuries to persons and property accruing in the operation of the railroad by the receivers as in its operation by the railroad company itself. This ground of exception must accordingly be overruled.' "

Pittsburg and Shawmut Coal Co. vs. *Delaware & N. R. Co.,* 289 Fed. 133:

A lengthy quotation from this case is necessary because of its immediate bearing upon the question here under consideration:

"The ground upon which these decisions are based is that a railroad franchise or corporate charter granted by a State may not be altered or modified, or the railroad released from any of its corporate obligations, without the consent of the State. For this court to permit its receiver to abandon this Andes branch, while the remainder of the railroad continues to be operated by the receiver, would be for the court, without the consent of the State, to alter or modify the corporate charter or franchise granted by the State, and to release the railroad from some of its obligations, which turned out to be undesirable and burdensome, while retaining the desirable ones. This should not be done without ample authority.

Counsel for the receivers cites, as authority for the proposition that the court has power to authorize the receiver to abandon a portion of the road, the case of *State* vs. *Old Colony Trust Co.,* 215 Fed. 307, 131 C. C. A. 581, L. R. A. 1915A, 549. In that case, however, justification for a departure from the rule set forth in the foregoing cases is based upon the fact that the statute of the State of Iowa, in which the road in that case was located, directly conferred upon the courts authority to change or remove a line of road after it had been permanently located and constructed. Code Iowa 1897, Pars. 2092, 2098. No such power is conferred upon the court by the statutes of New York. Section 16 of the Railroad Law (Consol. Laws, c. 49) applies to a change of route before construction, and has no relation to alteration or abandonment after construction.

No authority has been cited by the counsel for the receivers, except the Iowa case above referred to, and none has been found in which any Federal court has ever authorized a railroad company operating in a single State to abandon, without the consent of the State, the operation of a portion of a railroad while continuing to operate the remainder. The rate cases cited by counsel for the receiver have no analogy to the question here. The authority, therefore, to sustain the contentions of the receivers, is lacking.

There being no constitutional question, no question of interstate commerce, nor of the scope of the Federal power in respect to interstate commerce in this case, there would seem, therefore, to be no justification, in view of the authori-

ties above cited, for this court to assert a power which otherwise it does not possess, namely, power to modify the franchise contract between the State, and the State's corporate creation.

Moreover, the Federal statute expressly provides that a receiver appointed by a Federal court to operate a railroad within a State shall operate such railroad according to the valid laws of that State, in the same manner that the owner would be bound to do if in possession thereof, and provides a penalty for disobedience. Section 1047 of the Compiled Statutes; Judicial Code, Par. 65; *Erb* vs. *Morasch,* 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897; *Westinghouse etc.,* vs. *Binghamton R. Co.* (D. C.) 255 Fed. 378. Assuming that this provision of the Federal statute covers all the laws of the State, and is not confined to safety regulations, etc., the receiver not only could not abandon the Andes branch of the road without consent of the State, but could be punished for abandonment in any way other than as provided in the State statutes.

A Federal court may therefore, as shown, in the protection of rights guaranteed by the Federal Constitution, permit its receiver to abandon an entire railroad enterprise, whose further operation will result only in the confiscation of the owner's invested capital, but that, in the absence of any interstate commerce questions, is the extent of judicial interference with the corporate rights and obligations embodied in the franchise to the railroad company from the State."

Crawford vs. *Duluth St. Ry. Co.*, 60 Fed. (2d) 212:

In this case the court said:

> "The court, of course, in giving instructions to the receiver, is bound by the Federal statute which requires the receiver to manage and operate the property according to the valid laws of the State in which such property is situated, in the same manner that the owner would be bound to do if in possession thereof. 24 Stat. 554, Par. 2, Jud. Code Par. 65 (U. S. Code Ann., Title 28, Par. 124)."

In the case of *United States* vs. *Harris*, 177 U. S. 305, speaking of the above quoted section the court said:

> "It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the States and of the United States, whose object is to promote the safety, comfort and convenience of the traveling public."

In the case of *Mercantile Trust Co.* vs. *Tennessee Cent. R. Co.*, 286 Fed. 425, it was likewise held that receivers of railroads must operate the same in accordance with State statutes.

The case of *Felton* vs. *Ackerman*, 61 Fed. 225, seems to us to be precisely in point. In that case a receiver of a railroad appointed by a District Court had built a fence over a road and thereby obstructed it, contrary to State law.

The court said:

> "It is of the greatest importance that receivers of the Federal courts shall not be violators of the State laws; and whenever a court is made to know, in any proper way, that its receiver is *violating the laws of the State* in which is the property, of which he has charge, the court must *sua sponte direct him to cease further violation.*" (Italics ours.)

In the case at bar the court, instead of restraining the receiver from violating the State law, expressly authorizes and instructs him to proceed to violate the State law in two important particulars, thereby making the receiver superior to the law and rendering it, as to him, null and void.

> See *Sullivan* vs. *Hustis,* 237 Mass. 441, 130 N.E. 247, and *McNulta* vs. *Lockridge,* 141 U. S. 327.

In *Michigan* vs. *Michigan Trust Co.,* 286 U. S. 334, there was involved the right of the State to collect from a Federal equity receiver of a corporation a franchise tax imposed by State law on the privilege of doing business in a corporate capacity. The court held that the receiver was subject to the tax and that he must pay it.

In that connection the court said:

> "To protect through a receiver the enjoyment of the corporate privilege and then to use the appointment as a barrier to the collection of the tax that should accompany enjoyment would be

an injustice to the State and a reproach to equity."

In the same case, referring to these taxes, the court said:

> "They were taxes of such a kind that the corporation, by failing to pay them, became subject, if the State so elected, to a forfeiture of its franchise. * * * The receiver was under a duty to pay them when they accrued, and having failed to fulfill that duty then, it should be compelled to pay them now. The decisions as to this are persuasive and uniform. *Coy* vs. *Title Guarantee & Trust Co., supra; Bright* vs. *Arkansas,* 249 Fed. 950; *McFarland* vs. *Hurley,* 286 Fed. 365; *People* vs. *Hopkins,* 18 Fed. (2d) 731, 733; *In re Tyler,* 149 U. S. 164, 182."

If a District Court has the power to set aside State laws and to prevent the State from forfeiting the corporate franchise, why did this court say that if the State so elected it could forfeit the franchise?

There is no intimation in that case that the court had any power or jurisdiction to direct the receiver to ignore State laws either in respect to the payment of taxes, or in respect to operating the business of the corporation after the right to do business had been suspended through failure to pay the taxes. On the other hand, the opinion of the court seems plainly to indicate that if the receiver failed to comply with the State law the State could forfeit or suspend the corporate privileges and thus prevent the receiver from carrying on the business,

with the result that liquidation would become necessary.

We think that sufficient has been said herein to indicate that the order of the District Court was erroneous and the decision of the Circuit Court of Appeals was correct.

However, before concluding our discussion of this point some attention should be paid to the cases cited by petitioner which he claims are inconsistent with or contrary to the decision of the Circuit Court of Appeals herein:

Ex Parte Tyler, 149 U. S. 164, has already been discussed herein and its inapplicability to this case shown.

Harrison vs. *St. Louis etc. Ry. Co.* 232 U. S. 318, is not in point.

In that case it was held:

> "A State statute which forbids a resort to the Federal courts on the ground of diversity of citizenship and punishes by extraordinary penalties any assertion of a right to remove a case under the Federal law and attempts to divest the Federal courts of their power to determine whether the right exists, is unconstitutional as an attempted exertion of State power over the judicial power of the United States."

In the case at bar it is not a State statute of which petitioner complains but a Federal statute which requires him to obey the State statute.

In *Mississippi Mills* vs. *Cohn,* 150 U. S. 202, it was held that the jurisdiction of Federal courts,

sitting as courts of equity, cannot be enlarged or diminished by State legislation.

That is conceded, but it has nothing to do with this case. It was also held that the jurisdiction of this court is limited by 25 Stat. 693, and if that be true it must also be true that the jurisdiction of District Courts is limited by section 65 of the Judicial Code.

Rio Grande Ry. Co. vs. *Gomila,* 132 U. S. 478, held that property brought within the jurisdiction of a Circuit Court of the United States by seizure under process issued upon its judgment remains in its custody to be applied in satisfaction of its judgment notwithstanding the subsequent death of the debtor before the sale under execution.

Bowman vs. *Continental Oil Co.,* 256 U. S. 642, held that a gasoline excise tax, as applied to local sale and use by a distributor, is consistent with the due process and equal protection clauses of the Fourteenth Amendment, and as applied to intrastate business the court apparently found no objection to the requirement of the Statute that a license first be obtained before engaging in the business or to the provision that a failure to obtain the license constituted a misdemeanor. In effect, that case upholds the validity of the California act in so far at least as it applies to intrastate business.

In *Johnson* vs. *Maryland,* 254 U. S. 51, a State statute was involved which was held inapplicable to an employee of the Post Office Department, upon

the ground that Federal instruments are immune from State control.

In none of the foregoing cases did the court have under consideration the provisions of section 65 of the Judicial Code, and in none of such cases was anything said, we feel sure, that would lend any support to petitioner's contention here.

Crawford vs. *Duluth St. Ry. Co.*, 60 Fed. (2d) 212, has already been referred to herein and supports our position. Counsel for the petitioner, however, cite this case as being contrary to the decision of the Circuit Court of Appeals herein.

We think counsel are in error in that respect for the court recognized the binding effect of section 65 of the Judicial Code (see page 214, column 2), but avoided it by holding that the refusal of the city council to permit abandonment of a branch line was unreasonable and amounted to confiscation of property, and called attention to the fact (page 215) that the regulatory power conferred upon the city council by the State statute was subject to the limitation that the order must not be unreasonable. (See page 21 of petitioner's brief.) Holding that the order was unreasonable, the court concluded the statute was not violated by permitting the abandonment of the branch line.

A few other cases cited by petitioner dealing with garnishment statutes and statutes prohibiting Federal injunctions are obviously not in point.

We think it has been deminstrated that peti-

tioner's first and principal contention is without merit.

II

Petitioner's second contention is thus stated:

> "The provisions of the California gasoline tax legislation, interpreted as requiring this receiver to give a continuing bond or make a continuing deposit of cash or securities in the sum of $100,000 to insure payment of gasoline taxes of the State of California to accrue subsequently, are invalid because creating in effect an unlawful preference of the State of California over the United States in the collection of gasoline taxes and also subordinating all other expenses of receivership operations (including judicial costs and expenses) to the payment of gasoline taxes levied by the State of California."

Basing his contention that taxes are merely "expenses of administration" upon the decision in *Michigan* vs. *Michigan Trust Co.,* 286 U. S. 334, petitioner argues that the effect of the California statute is to give the State a preference over the United States in the collection of gasoline taxes, and that therefore the statute is invalid.

We are not here concerned with any question of priority between the State and the United States. The question is merely whether a State statute shall be obeyed by the receiver. If the Federal law required the receiver to give bond for the payment of the Federal gasoline tax, we assume the receiver would have to comply with it. However, so far

as we are advised, Congress has not imposed such a requirement, but it may do so at some future time. We would then have two Federal laws with which the receiver would have to comply, the law requiring him to furnish a bond for payment of the Federal taxes and the law requiring him to obey the State statute. In the meantime, if the bond is given as provided in the State statute and the taxes due the State are not paid, the surety can be compelled to pay them, and out of the assets of the company it may be assumed the Federal government will collect its taxes, before distribution of the assets to creditors, in view of its statutory preference under Revised Statutes, section 3466.

In any event there is now no dispute between the State and the United States regarding taxes, or any other dispute in fact, though petitioner seems to be of the opinion that he must in this proceeding protect the United States from action by the State.

When the California act was amended in 1931 to provide for the giving of a bond as security for the payment of taxes no Federal law was in existence imposing a tax on the sale of gasoline.

Congress did see fit, in adopting the Federal act, to provide, as it might have done, that security be given the Federal government for the payment of the Federal tax on the sale of gasoline.

Assuredly it does not follow that because the Federal government does not require such security the State may not legally do so. Even if it be true that Congress *may* give priority to debts due the United

States, as was held in *People of New York* vs. *Maclay et al.,* 288 U. S. 290, in this instance Congress has not done so, and therefore the Federal government can not complain because the State has protected itself in this respect.

But the question of the relative priority of debts due the United States and the State is not the issue in this case. That question can be decided if and when it arises, and in a proper proceeding.

The reason why the State requires security for the payment of this particular tax is a matter of history, with which petitioner is fully familiar. We think we may be pardoned for informing this court that at the time this particular statute took effect the company of which petitioner is the receiver was indebted to the State to the exent of approximately $330,000, no part of which has been paid, and that other companies engaged in a like business were indebted to the State to the extent of approximately $1,000,000 more, and that the State had no security for the payment of this large sum except its general statutory lien upon the properties of the companies.

This lien the State was prevented from enforcing, even if it had desired to do so, when this company went into receivership.

The evils of the old system were so obvious and notorious that the Legislature in 1931 amended the Motor Vehicle Fuel Act so as to require *all* distributors of gasoline to give security to the State for the payment of the taxes thereafter assessed against

them. The law operates with uniformity and equality and since its adoption gas tax delinquencies have almost entirely been eliminated.

The hardship upon petitioner, if such it be, is no greater than that upon every other distributor of gasoline, and petitioner has no cause to complain. What he is seeking in reality and practical effect is a preference over his competitors in the gasoline business, for it would amount to that if he were permitted to do business on more favorable terms.

The case of *People* vs. *Maclay,* 288 U. S. 290, cited by petitioner is not in point for that case involved the question of priority of *payment of taxes* between the United States and the State of New York, and the court held that the statutory preference given the United States prevailed over an unperfected State lien. We do not see what bearing that case has on the question presented in this case.

Nor, in our opinion, is there anything in *Michigan* vs. *Michigan Trust Co., supra,* which lends any support to petitioner's contention here.

III

Petitioner's third and final contention is thus expressed:

> "The provisions of the California gasoline tax legislation when interpreted as requiring this receiver to give bond or deposit cash or securities in the sum of $100,000 to secure future payment of gasoline taxes, irrespective of the

impossibility of compliance therewith by this receiver, are invalid as applied to the facts of this case whether generally so or not."

We understand counsel's contention here to be that even though the California statute may be valid in respect to all other distributors of gasoline, it is unconstitutional and void in respect to a Federal equity receiver if the receiver is unable to comply therewith. In other words, a receiver is entitled to preferential treatment merely because of his status as such.

To give section 65 any such meaning it would be necessary to interpolate therein the words "provided such receiver or manager is able to do so," following the words "shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated."

That the section is not subject to such construction is made clear by the words "in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

Counsel for petitioner concede that an owner or possessor of the property would have to comply with the State law, but in respect to a receiver they say the law does not mean what it says, but that it means "in some other manner" instead of "in the same manner."

The Circuit Court of Appeals answered this contention by saying:

> "The statute (section 65) is *plain* and *emphatic,* and we can not read into it *any exception* which would permit a receiver to ignore or refuse to comply with its mandate." (Italics ours.)

The reason for this is perfectly clear, for if the receiver could be permitted to ignore the State law, the effect would be to permit him to ignore the Federal law as well, for it is the Federal law which compels compliance with the State law.

The case of *Mintz* vs. *Baldwin,* 2 Fed Supp. 700, cited by the petitioner, restates a proposition frequently announced by this court to the effect that a statute can not be interpreted as extending beyond those matters which it was within the constitutional power of the Legislature to reach.

McCullough vs. *Virginia,* 172 U. S. at page 112.

The difficulty confronting petitioner here is that it is a Federal law which commands the receiver to obey valid State laws, and therefore if the State law is valid as to others it is valid as to him because section 65 makes it so.

In the final analysis petitioner's real complaint is that Congress should not have enacted section 65 in its present form, but should have provided that if a receiver found it inconvenient or impossible to comply with a State law he should be relieved of the necessity of so doing. Since Congress made no such exemption in favor of receivers it is not the province of a court to supply the omission.

CONCLUSION

In conclusion and by way of recapitulation, we say that the apparent theory on which the District Court made this order was that, however valid the State law might be as applied elsewhere, it could not be made to apply to the receiver if by so doing his operations in conducting the business of the corporation were in any manner interfered with. In other words, that the receiver could not be inconvenienced or embarrassed in his operations even by a valid State law.

That this is not a correct conception of the meaning of section 65 of the Judicial Code we think has been demonstrated.

That section contains no reference to the *convenience* of the receiver. Its clear intent and meaning is that a receiver is to stand in respect to valid State laws in the same position that the company of which he is the receiver would stand—that he is not to be preferred or singled out for special favors or permitted to exercise an authority or claim an immunity which the company itself could not exercise or claim. That this is the true meaning of section 65 is illustrated by the decision of this court in the case of *Michigan* vs. *Michigan Trust Co.,* 286 U. S. 334, cited and quoted from herein and by numerous other cases such as:

United States vs. *Harris,* 177 U. S. 305;

Erb vs. *Morasch,* 177 U. S. 584;

Broad River Power Co. vs. *South Carolina,* 281 U. S. 537;

Westinghouse etc. Mfg. Co. vs. *Binghamton Ry. Co.,* 255 Fed. 378;

Mercantile Trust Co. vs. *Tenn. Cent. Ry. Co.,* 286 Fed. 425;

Felton vs. *Ackerman,* 61 Fed. 225.

There is no Federal law which justifies the continuance of a Federal receivership if the same can not be done in accordance with valid State laws.

If a situation arises where the receiver finds himself confronted with State laws which make it so inconvenient and embarrassing to him that he can not continue to operate the business, his course necessarily must be to ask the court for an order of liquidation.

Suppose the receiver here had represented to the court that it seriously embarrassed him to take sufficient funds from his receipts to pay the State tax of three cents a gallon on all gasoline sold by him, and requested the court to authorize him to decline to pay that tax. Could it be seriously argued that the court had the power to make such an order?

But petitioner's position here involves that very absurdity for if the court can set aside *one* State law it can set aside *any* State law, and therefore it could relieve the receiver from the obligation to pay the gallonage tax to the State, or from the obligation to pay local taxes to the county, or both.

If the objects and purposes of the receivership can not be accomplished without violating State laws and operating the business in a manner contrary to such laws, then the only alternative is liquidation.

We respectfully submit that the decision of the Circuit Court of Appeals for the Ninth Circuit was correct and that the petition herein should be denied.

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